BROKEN H. RANCH CO.

IBLA 77-485 Decided January 26, 1978

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting domestic water pipeline right-of-way application W 51039.

Affirmed.

1. Rights-of-Way: Applications -- Water and Water Rights: State Laws

When considering an application for determination of right-of-way privileges, the Department of the Interior has no power to determine questions of control and appropriation of water rights between private parties which is a matter of state law. An application for a water pipeline right-of-way will not be approved where the applicant has no existing right to the water which he proposes to convey.

2. Rights-of-Way: Applications -- Withdrawals and Reservations: Springs and Waterholes

Executive Order No. 107 of April 17, 1926, withdrew from appropriation all waterholes on public lands, and a purported right to appropriate water from the spring that postdates the withdrawal is without effect.

3. Act of February 15, 1901 -- Rights-of-Way: Applications -- Secretary of the Interior

Pursuant to the Act of February 15, 1901, repealed by sec. 706(a) of the Act of October 21, 1976 (90 Stat. 2743, 2793), the Department had discretionary authority to permit the use of a right-of-way across public lands to supply water for domestic

purposes; however, a right-of-way application for such use was properly rejected where approval of the grant would be contrary to the public interest.

APPEARANCES: C. Edward Webster II, Esq., Housel & Webster, Cody, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The Broken H. Ranch Co. has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated July 11, 1977, rejecting its application (W 51039), filed pursuant to the Act of February 15, 1901 (43 U.S.C. § 959), for domestic water pipeline rights-of-way across public lands in sec. 15, T. 52 N., R. 104 W., 6th principal meridian, Park County, Wyoming. The rights-of-way are to service four houses to be built by appellant. The application was rejected for the following reasons:

> As to pipelines SW1 and SW2 (Nos. 3 and 4), the source of water was to be a spring located on private land owned by Fred and Susan Puschman dba. Sheep Spring Ranch. Under the date of June 15, 1977, Mr. Puschman has informed us by letter that he will not grant you access to the spring "under any circumstances." Because your water right to this spring cannot be perfected without legal access, rejection as to this portion of your application is proper.
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> The source of water for the balance of your application, pipelines SE1 and SE2 (Nos. 1 and 2), is shown in the application as two separate springs. Based upon our field examination, we believe that in reality there is only one spring which may have more than one surface seep. A nearby second spring located on the private land of the Red Pole Ranch is probably interconnected. Our reason for rejection as to the balance of your application is that we have determined that lot 31 within which the main spring is located constitutes a public water reserve.
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> By Executive Order No. 107, dated April 17, 1926, the President of the United States ordered that every smallest legal subdivision of the public land surveys which was vacant, unappropriated, unreserved, public land and which contained a spring or water hole be withdrawn and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916 (39 Stat. 865; 43 U.S.C. 300). The Executive Order was designed to preserve for general public use and benefit

all unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. Even though it did not specify geographic areas, the order established a public water reserve for all springs and water holes capable of providing enough water for general use for watering purposes.

The spring in lot 31 is the sole stock water source on a 1,249 acre tract of public lands administered as grazing lands under Section 15 of the Taylor Grazing Act (43 U.S.C. 315 et seq.). The grazing allotment provides 44 animal unit months of forage. This value to the public would be lost if the spring were developed for private domestic use. In addition to the grazing licensee, there are other private users whose livestock drink from the spring from time to time because the adjoining private lands are not fenced. These facts establish the basis for concluding that the spring constitutes a public watering place subject to the effect of Executive Order No. 107.

Because your Wyoming State permit to appropriate water from the spring post dates the federal water rights established by reservation in 1926, it is without effect. See Park Center Water District and The Canon Heights Irrigation and Reservoir Company (February 3, 1977), 84 I.D. 87.

In addition, BLM set forth several secondary reasons for the rejection of pipelines SE1 and SE2 (Nos. 1 and 2) based upon its exercise of discretionary authority:

Your development of the spring would eliminate an important water source for deer and other wildlife. Our Clark's Fork Shoshone Resource Area Management Framework Plan has identified the lands involved in your application as crucial deer winter range. Heavy deer use has been documented by our wildlife specialist and by a wildlife biologist working with the Wyoming State Game and Fish Department. Our observations are that the deer will drink from the spring where they are protected by a vegetation screen in preference to exposing themselves along the river bank. In the winter, their use of the spring becomes critical because the river ices over and is not available for obtaining drinking water.

Our management framework plan has identified these lands and others along the North Fork of the Shoshone River as having significant scenic and recreation values because of their location along Highway 14, which is a

major route into Yellowstone National Park. We believe that your development of the spring would disturb the rock and soil along the pipelines and change the vegetation at the spring thereby diminishing these values.

Because we believe that the second spring on the neighboring private land is interconnected with the seeps of the principal spring, we must be careful not to destroy its effectiveness and thereby destroy private property rights in its use.

Lastly, we believe that your development of the principal spring will require some access to the nearby private land to the south owned by Carl and Mary Ballinger. Mr. Ballinger has informed us by letter dated June 16, 1977, that he will not allow you to go upon his land to do your development work. Here again, rejection is proper.

In its statement of reasons on appeal, appellant argues that BLM may not deny its application as to pipelines SW1 and SW2 (Nos. 3 and 4) because of the claimed inaccessibility of the spring, as access to the spring is a matter of state law and a private way of necessity could be established. In regard to pipelines SE1 and SE2 (Nos. 1 and 2) appellant asserts "it is very difficult for anyone without doing a complete geological evaluation to determine whether or not these are two separate springs or in fact two separate surface seeps." In addition, appellant asserts if the springs are interconnected and adversely affect the Red Pole Ranch, the Red Pole Ranch's remedy is under state law. Further, appellant urges that BLM is acting in an arbitrary manner as to its secondary reasons for rejection of the right-of-way application.

[1] The appellant is correct in stating that access to water springs located on private lands owned by another is a matter determinable by state law. When considering an application for determination of right-of-way privileges, the Department of the Interior has no power to decide between private parties a question involving the control and appropriation of water rights under state law. Harold C. Brown, A-30536, 73 I.D. 172 (May 31, 1966); Hatch Brothers Co., Leland R. Gamble, A-27525 (January 13, 1958).

However, BLM is correct in its denial of appellant's application as to pipelines SW1 and SW2 (Nos. 3 and 4). The Department will not approve any application for a water pipeline right-of-way if it is determined that the applicant has no existing right to the water which he proposes to convey. Harold C. Brown, supra. Even if appellant may be correct that a private way of necessity is available under Wyoming law, appellant has not shown it has obtained the legal access to the source of water it seeks to transport. Merely stating

a legal proposition without showing appellant has an enforceable court decree or other legal adjudication of its asserted rights is not sufficient.

[2] BLM was also correct in its ruling as to pipelines SE1 and SE2 (Nos. 1 and 2). All water holes on public lands and the surrounding acreage were withdrawn by Executive Order No. 107 of April 17, 1926, 43 CFR 2311.0-8, 30 CFR 241.5, n. 1, pursuant to Section 10 of the Act of December 29, 1916, 39 Stat. 865, 43 U.S.C. § 300 (1970). The Executive Order was designed to preserve for general public use and benefit all unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. In the Executive Order, the President ordered that every smallest legal subdivision of the public land surveys which was vacant, unappropriated, unreserved, public land, and which contained a spring or water hole, be withdrawn and reserved for public use. Thus, the spring on public land has been withdrawn from disposition since the issuance of the Executive Order. A right to appropriate water from the spring that postdates the withdrawal is without effect. See Park Center Water District and The Canon Heights Irrigation and Reservoir Company, 28 IBLA 368, 84 I.D. 87 (1977).

[3] Pursuant to the Act of February 15, 1901, repealed by section 706(a) of the Act of October 21, 1976, 90 Stat. 2743, 2793, commonly dubbed FLPMA, the Department had discretionary authority to permit the use of a right-of-way across public lands to supply water for domestic purposes. Hazel E. Kincaid, 25 IBLA 257 (1976); Scott Hampson 18 IBLA 230 (1974); William A. Lester, 2 IBLA 172 (1971). In the exercise of this discretion, a domestic water right-of-way application is properly rejected where approval thereof would be contrary to the public interest. Kincaid, supra, Hampson, supra. Adjudications under the laws repealed by FLPMA are to be made "under existing rules and regulations * * * to the extent practical" prior to the promulgation of rules and regulation under FLPMA. Section 310 of FLPMA, 90 Stat. 2768.

BLM's decision to reject pipelines SE1 and SE2 in exercise of its discretionary authority is amply supported by the record. The Environmental Analysis Record states the aesthetic values of the area of the proposed right-of-way may be damaged. The right-of-way is along Highway 14, a major access route to Yellowstone National Park. During the summer months of 1974, an average of 1,571 vehicles a day or 1.3 million travelers a year traveled along Highway 14 to Yellowstone National Park. The proposed right-of-way would alter the scenic values along this route because natural vegetation would be destroyed and "could not be readily replaced."

Additionally, James Yorgason, Wildlife Biologist Coordinator, Game and Fish Department, State of Wyoming, stated in a letter, dated

June 8, 1977, that it is "clearly evident * * * this is an important watering area for deer * * *. If and when the area is further developed, the spring will undoubtedly be the only water readily available to deer." Additionally, Cody is a tourist center in the summer because of its proximity to Yellowstone, and is one of the most sought-after big game hunting areas in the U.S. for deer, elk and big horn sheep.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge